

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

Gabriella Reyes,

Case No. 2:18-cv-01727-GMN-BNW

Plaintiff,

SCREENING ORDER AND REPORT AND RECOMMENDATION

V.

Daniel Flagg, et al.,

Defendants.

Pro se plaintiff Gabriella Reyes initiated this lawsuit on September 7, 2018 by filing an application to proceed *in forma pauperis* and a complaint. ECF No. 1. Plaintiff submitted the affidavit required by 28 U.S.C. § 1915(a) showing an inability to prepay fees or costs or give security for them. Accordingly, the court will grant her request to proceed *in forma pauperis*. The court now screens her complaint.

I. ANALYSIS

A. Screening standard

Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and may only

1 dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in support of
 2 his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir.
 3 2014) (quoting *Iqbal*, 556 U.S. at 678).

4 In considering whether the complaint is sufficient to state a claim, all allegations of
 5 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wyler*
 6 *Summit P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
 7 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
 8 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 9 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*
 10 Unless it is clear the complaint’s deficiencies could not be cured through amendment, a pro se
 11 plaintiff should be given leave to amend the complaint with notice regarding the complaint’s
 12 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 **B. Screening the complaint**

14 Plaintiff alleges the following: She advertised her services of “freelance advocacy and
 15 paralegal work” on Craigslist. ECF No. 1-1 at 2-3. Her ad takes customers to her website where
 16 she has a “no refund” policy. *Id.* at 3. Plaintiff discussed certain work Defendants wanted
 17 completed, and Defendants acknowledged her “no refund” policy. *Id.* The “work was done” and
 18 “written product” was delivered to Defendants. *Id.* Defendants paid Plaintiff, but after her work
 19 was delivered to Defendants, Defendants “did a reversal of the payment” with their bank. *Id.* at 4.
 20 Plaintiff did not agree to this and sent several demand letters to Defendants. *Id.* Defendants have
 21 not repaid Plaintiff for the work she performed. *Id.* Accordingly, Plaintiff filed this lawsuit.

22 Plaintiff asserts several causes of action. She alleges the following state law causes of
 23 action: fraud, constructive fraud, breach of contract, breach of oral agreement, and conversion.
 24 ECF No. 1-1. She alleges the following potential federal causes of action: mail fraud under 18
 25 U.S.C. § 1341, bank fraud under 18 U.S.C. § 1344, fraud by wire, radio, or television under 18
 26 U.S.C. § 1343, copyright infringement, and vicarious copyright infringement. *Id.*

27 Plaintiff alleges that she resides in Nevada and that all Defendants reside in California,
 28 except Betty Mesi, who also resides in Nevada. *Id.* at 2.

1 As explained in more detail below, the Court will dismiss Plaintiff's complaint for lack of
2 jurisdiction but will give Plaintiff leave to amend certain claims. The Court will recommend that
3 Plaintiff's claims under 18 U.S.C. §§ 1341, 1343, and 1344 be dismissed with prejudice,
4 however, for failure to state a claim.

5 “Federal district courts are courts of limited jurisdiction, possessing only that power
6 authorized by Constitution and statute.” *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024,
7 1027 (9th Cir. 2011) (quotation omitted). Federal district courts “have original jurisdiction of all
8 civil actions arising under the Constitution, laws, or treaties of the United States,” otherwise
9 known as federal question jurisdiction. 28 U.S.C. § 1331. Federal district courts also have original
10 jurisdiction over civil actions in diversity cases “where the matter in controversy exceeds the sum
11 or value of \$75,000” and where the matter is between “citizens of different States.” 28 U.S.C. §
12 1332(a). “Section 1332 requires complete diversity of citizenship; each of the plaintiffs must be a
13 citizen of a different state than each of the defendants.” *Morris v. Princess Cruises, Inc.*, 236 F.3d
14 1061, 1067 (9th Cir. 2001).

15 A court may raise the question of subject-matter jurisdiction *sua sponte*, and it must
16 dismiss a case if it determines it lacks subject-matter jurisdiction. *Special Investments, Inc. v.*
17 *Aero Air, Inc.*, 360 F.3d 989, 992 (9th Cir. 2004); Fed. R. Civ. P. 12(h)(3). Here, Plaintiff does
18 not allege facts sufficient to invoke the Court’s jurisdiction.

19 Regarding diversity jurisdiction, Plaintiff alleges that she resides in Nevada, as does a
20 Defendant, Betty Mesi. ECF No. 1-1 at 2. Accordingly, there is not complete diversity, and
21 Plaintiff has not established diversity jurisdiction.

22 Plaintiff also has not established federal question jurisdiction. As noted above, Plaintiff
23 alleges the following potential federal causes of action: mail fraud under 18 U.S.C. § 1341, bank
24 fraud under 18 U.S.C. § 1344, fraud by wire, radio, or television under 18 U.S.C. § 1343,
25 copyright infringement, and vicarious copyright infringement. *Id.* As explained below, Plaintiff’s
26 complaint fails to state a claim for any of these potential federal causes of action.

27 As an initial matter, Plaintiff cannot sue Defendants under 18 U.S.C. §§ 1341, 1343, or
28 1344. “[C]ourts have consistently found that the mail and wire fraud statutes do not confer private

1 rights of action.” *Masin v. Vistakon Pharm., LLC*, No. 308CV00550RCJVPC, 2010 WL
 2 11594971, at *2 (D. Nev. June 14, 2010); *see, e.g., Ross v. Orange Cty. Bar Ass’n*, 369 F. App’x
 3 868, 869 (9th Cir. 2010) (no private right of action for mail fraud under 18 U.S.C. § 1341);
 4 *Lobstein v. Washington Mut. Mortg. Pass-Through Certificates WMALT Series 2007-OC1*, No.
 5 219CV07615SVWJPR, 2019 WL 9362078, at *3 (C.D. Cal. Dec. 18, 2019) (no private right of
 6 action under 18 U.S.C. §§ 1341 or 1344); *Yeske v. Bendetov*, No. 2:15-CV-1513-GMN-NJK,
 7 2016 WL 1610605, at *2 (D. Nev. Apr. 21, 2016) (“[I]t is well established that
 8 [18 U.S.C. § 1343] is a criminal provision that does not give rise to a private cause of action.”);
 9 *Brown v. Bettinger*, No. 2:15-CV-00331-APG, 2015 WL 4162505, at *3 (D. Nev. July 8, 2015)
 10 (“Plaintiff cannot sue Defendant for civil damages for a violation of 18 U.S.C. § 1343.”); *Bruce v.*
 11 *Homefield Fin., Inc.*, No. 2:10-CV-2164-KJD-PAL, 2011 WL 4479736, at *3 (D. Nev. Sept. 23,
 12 2011) (claim under 18 U.S.C. § 1344 must be dismissed, because there is no private right of
 13 action); *Small v. Mortg. Elec. Registration Sys., Inc.*, No. 2:09-CV-0458 GEB DAD, 2010 WL
 14 3719314, at *9 (E.D. Cal. Sept. 16, 2010) (no private right of action under 18 U.S.C. § 1344).
 15 Accordingly, the Court will recommend that Plaintiff’s claims under 18 U.S.C. §§ 1341, 1343,
 16 and 1344 be dismissed with prejudice for failure to state a claim, as these statutes do not create a
 17 private right of action.

18 Plaintiff also failed to state a claim for copyright infringement. “To prove copyright
 19 infringement, a plaintiff must demonstrate (1) ownership of the allegedly infringed work and
 20 (2) copying of the protected elements of the work by the defendant.” *Unicolors, Inc. v. Urban*
 21 *Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017). Here, Plaintiff pled the first element of
 22 copyright infringement (ownership) by alleging that she is sole owner of her writing. ECF No. 1-1
 23 at 15. However, she did not plead the second element (copying of the protected elements of the
 24 work by defendant). Rather, the only other facts that Plaintiff alleges are that Defendants revoked
 25 payment, used Plaintiff’s services and product for their own purposes, and “used the work with
 26 the court.” *Id.* at 14-15. Even liberally construing these allegations and accepting them as true, as
 27 the Court must, Plaintiff has not pled enough facts to allege that Defendants copied

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1 the protected elements of Plaintiff's work. Accordingly, Plaintiff has not stated a claim for
2 copyright infringement.

3 Plaintiff also has not stated a claim for vicarious copyright infringement. Vicarious
4 liability may be imposed "if 'the defendant profits directly from the infringement and has a right
5 and ability to supervise the direct infringer.'" *UMG Recordings, Inc. v. Shelter Capital Partners*
6 *LLC*, 718 F.3d 1006, 1032–33 (9th Cir. 2013); *see also Metro-Goldwyn-Mayer Studios Inc. v.*
7 *Grokster, Ltd.*, 545 U.S. 913, 930 (2005) ("One infringes . . . vicariously by profiting from direct
8 infringement while declining to exercise a right to stop or limit it."). Here, Plaintiff has not pled
9 enough facts to establish any direct infringement. Accordingly, she has not pled enough facts to
10 establish vicarious liability for such infringement either. As such, Plaintiff failed to state a claim
11 for any federal cause of action.

12 1. *Amendment*

13 If Plaintiff chooses to amend, she must include factual allegations demonstrating that a
14 federal question exists, thereby allowing the court to determine its own jurisdiction. Alternatively,
15 she must include factual allegations demonstrating there is complete diversity of citizenship and
16 more than \$75,000 in controversy.

17 Additionally, Plaintiff is advised that if she files an amended complaint, the original
18 complaint (ECF No. 1-1) no longer serve any function in this case. As such, if Plaintiff files an
19 amended complaint, each claim *and the involvement of each specific defendant* must be alleged
20 sufficiently. The court cannot refer to a prior pleading or to other documents to make plaintiff's
21 amended complaint complete. The amended complaint must be complete in and of itself without
22 reference to prior pleadings or to other documents.

23 Finally, Plaintiff is advised that she must allege facts regarding the approximate dates of
24 the incident at issue to allow the court to determine whether the incident occurred within the
25 applicable statute of limitations.

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II. CONCLUSION

IT IS THEREFORE ORDERED that plaintiff's application for leave to proceed *in forma pauperis* (ECF No. 4) is GRANTED. Plaintiff is permitted to maintain this action to conclusion without prepaying fees or costs or giving security for them.

IT IS FURTHER ORDERED that the clerk of court must detach and separately file Plaintiff's complaint (ECF No. 1-1).

IT IS FURTHER ORDERED that Plaintiff's complaint is dismissed without prejudice and with leave to amend, except as stated below. **If Plaintiff chooses to file an amended complaint, she must do so by October 22, 2020 or this Court will recommend that her case be dismissed.**

IT IS RECOMMENDED that Plaintiff's causes of action under 18 U.S.C. §§ 1341, 1343, and 1344 be DISMISSED with prejudice for failure to state a claim.

III. NOTICE

This report and recommendation is submitted to the United States district judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED: September 22, 2020

Brenda Weksler